

Identification:

a) Slovakia / b) Constitutional Court of the Slovak Republic / c) Plenum / d) 13.05.2020 / e) PL. ÚS 13/2020 / f) / g) / h) .

Systematic Thesaurus:

05.03.32 Fundamental rights – Civil and political rights – Right to private life

05.03.32.01 Fundamental rights – Civil and political rights – Right to private life – Protection of personal data

05.03.36.02 Fundamental rights – Civil and political rights – Inviolability of communications – Telephonic communications

Alphabetical Index:

COVID-19

Headnotes:

The current Covid-19 pandemic and the necessity of protecting the life and health of the population justifies certain interferences with fundamental rights, namely in this case with the right to privacy and personal data protection. However, in adopting measures aimed at preventing further spread of the disease, the legislator must pass legislation which is clear, unambiguous and which provides sufficient legal guarantees against the misuse of the data.

Summary:

The case primarily concerns a piece of legislation passed in March 2019 as response to the Covid-19 pandemic. The contested legislation amended the Law on Electronic Communications (“LEC”), allowing the Public Health Authority (“PHA”) to gather and use certain personal data for the purposes of Covid-19 tracking. As a side note, the contested legislation also amended two other laws dealing with the justice system as a response to the present situation in judiciary, but these changes will not be the focus of this précis.

The amended provisions first obliged telecom providers to retain certain telecom identification and location data of effectively everyone for the duration of an extraordinary situation or state of emergency declared in the healthcare system due to the occurrence of a pandemic or the spread of dangerous infectious human disease.

The amended provisions specified three reasons for this retention obligation, namely (1) processing in anonymised form for statistical purposes, (2) identification of people who need to be notified by message of special measures adopted by the PHA, and (3) identification of users for the purposes of life and health. The first reason was not contested as the processing

was to be carried out in an anonymised form and thus did not violate anyone's right to privacy.

Subsequently the data were to be provided to the PHA on the basis of a reasoned written request and the latter was allowed to process and retain the obtained data for the duration of the extraordinary situation or state of emergency in healthcare, but no longer than until 31 December 2020.

The Court noted at the outset that the contested provisions oblige telecom providers to conduct blanket data collection about everyone who has mobile phone services registered with them. Only their subsequent provision to the PHA may be considered differentiated according to some criteria specified in the law. Thus, the blanket collection and subsequent provision of identification and location phone data interfere with the right to privacy and personal data protection. Such interference may be justified by public interest consisting in the need to protect life and health of others during a pandemic. However, any such restriction to fundamental rights must be sufficiently clear, proportionate to the circumstances and strong guarantees against misuse of the data must be present.

Since the Court's task at this stage of proceedings was to decide on admissibility and the petitioners' request to suspend the contested provisions, it limited the scope of its review to only those aspects which might cause irreparable harm. Thus, the Court refrained for the time being from conducting a full-scale proportionality test and rather focused on the evaluation of legal guarantees against data misuse and the general clarity and unambiguity of the contested provisions. Even if the latter later turned out to be unconstitutional, sufficient legal guarantees and clarity would prevent unwanted misuse of the data and thus any immediate harm.

The Court received statements by the Ministry of Justice, the PHA and other stakeholders from which it followed that public authorities envisaged three different solutions: (A) tracking by means of a phone interview with the use of the interviewed person's phone movement map, subject to that person's consent; (B) launch of an application with an informational and self-monitoring function; (C) PHA requesting identification and partial location data of persons who recently returned from high-risk countries.

The Court recalled its previous case-law and the case-law of the CJEU, according to which blanket identification and location data collection constitutes an especially serious interference with the relevant rights and therefore the strictest criteria must be applied in assessing the law's clarity and the legal guarantees. It concluded that the formulation "identification of users for the purposes of life and health" was overly vague and its application unpredictable and for that reason unacceptable in a democratic society. It therefore suspended the said provision together with the provisions allowing the PHA's access to that data, since the legislation failed to provide sufficient legal guarantees. The required guarantees include subsidiarity of the use of the obtained data, clear definition of the purpose for which the data are to be used, quality supervision by a court or other independent authority, ensuring data protection and security, the obligation to erase the data after a certain time and informing the persons concerned.

The Court did not find unconstitutionality in the provision obliging telecom providers to collect data necessary to identify people who need to be notified by message of special measures adopted by the PHA. It did, however, suspend those provisions which allowed the

PHA to have access to those data upon request, as such notification could be carried out by the telecom providers themselves and thus there was no need to give the PHA access to them. The Court also pointed out the absence of the same legal guarantees as mentioned above.

Languages:

Slovak